



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 15, 1994

Mr. E. Dean Gage
Interim President
Texas A&M University
College Station, Texas 77843-1246

OR94-073

Dear Mr. Gage:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code (former V.T.C.S. article 6252-17a).¹ Your request was assigned ID# 24157.

Texas A&M University (the "university") received an open records request for, *inter alia*, the following information:

A. -- Robert Smith's letter and/or report that details the times, dates and costs of trips paid for by Barnes and Noble in conjunction with the bookstore contract at Texas A&M University. . . .

* * * *

C. -- other reports, correspondence, affidavits, and/or memorandum given to Jimmy Bond or other top university officials in response to allegations raised in [an] anonymous letter [received by the university concerning certain alleged wrong-doing by, among others, Board of Regents Chairman Ross D. Margraves, Jr.] or in news reports.

¹The Seventy-third Legislature repealed article 6252-17a, V.T.C.S. Acts 1993, 73d Leg., ch. 268, § 46. The Open Records Act is now codified in the Government Code at chapter 552. *Id.* § 1. The codification of the Open Records Act in the Government Code is a nonsubstantive revision. *Id.* § 47.

You contend that the records requested in items A and C come under the protection of section 552.108 of the Government Code.

Section 552.108 of the Government Code, known as the "law enforcement" exception, excepts from required public disclosure:

(a) A record of a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime
[and]

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement

Whether this exception applies to particular records depends on whether their release would "unduly interfere" with law enforcement or prosecution. Open Records Decision Nos. 434 (1986); 287 (1981). One of the purposes of the exception is to protect law enforcement and crime prevention efforts by preventing suspects and criminals from using records in evading detection and capture. See Open Records Decision Nos. 133, 127 (1976).

You inform this office that the university has turned over to the Texas Department of Public Safety (the "department") the records requested in items A and C in cooperation with the department's criminal investigation of certain allegations contained in the anonymous letter received by the university. This office has confirmed with the department that these records relate to an on-going criminal investigation and that the department specifically requests that the records sought in items A and C not be released to the public at this time.

In *Houston Chronicle Publishing Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App. - Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976), the court of civil appeals established the guidelines on what constitutes public information contained in law-enforcement files pertaining to pending criminal investigations. The court's holding was summarized in Open Records Decision No. 127, which held that evidence and witness statements collected during the course of a pending criminal investigation may be withheld pursuant to the "law-enforcement" exception. See Open Records Decision No. 127 at 9. Accordingly, the university may withhold the records requested in items A and C pursuant to section 552.108.²

The requestor also seeks:

²We note that where an incident involving allegedly criminal conduct is under active investigation or prosecution, section 552.108 may be invoked by any proper custodian of information which relates to the incident. Open Records Decision Nos. 474 (1987); 372 (1983).

D. -- copies of audit reports on the Food Services Department at Texas A&M between 1987 and the present. These would include audit reports prepared both internally by the department and those prepared by the audit department at the university.

Although you have not submitted to this office for review copies of the requested audit reports, you contend that the records contained in "Exhibit D" demonstrate the likelihood of litigation³ with regard to the reports and thus contend that the audit reports come under the protection of section 552.103 of the Government Code.

Section 552.103(a), known as the "litigation" exception, excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

To secure the protection of section 552.103(a), a governmental body must demonstrate that the requested information relates to pending or reasonably anticipated litigation. Open Records Decision No. 588 (1991) at 1. The mere chance of litigation will not trigger section 552.103(a). Open Records Decision No. 452 (1986) at 4 and authorities cited therein. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish concrete evidence that litigation involving a specific matter is realistically contemplated and is more than mere conjecture. *Id.*

The records contained in Exhibit D consists solely of correspondence from an attorney who represents three university employees in connection with those employees' reassignment and related grievances they have filed against the university. Although the attorney makes references to the possibility of filing suit against the university in the event of the occurrence of future unlawful acts by the university, *e.g.*, acts of discrimination or retaliation in violation of the Texas Whistleblower Act, Gov't Code ch. 554, we need not determine here whether the university may reasonably anticipate litigation with regard to those matters at this time. Assuming *arguendo* that litigation is

³The Texas Ranger who is heading the investigation relating to the documents requested in items A and C has informed this office that his investigation does not encompass the records requested in item D. Nor have you otherwise indicated that the records requested in item D in any way relate to any other pending criminal investigation. We therefore assume that it is your contention that the requested audit reports relate to anticipated civil, rather than criminal, litigation.

imminent, you have failed to demonstrate exactly how the contents of the audit report "relate" to any such litigation. As noted above, information may be withheld from the public under this section only if the information "relates" to pending or reasonably anticipated litigation. Section 552.103(a) does not apply to requested information absent a showing of a direct relationship between the information sought and the pending or contemplated litigation. Open Records Decision Nos. 429 (1985); 222 (1979). When a governmental body fails to explain how a particular exception applies, the exception is ordinarily waived unless the information is deemed confidential under the act. See Attorney General Opinion JM-672 (1987). Because you have failed to demonstrate how the requested audit reports relate to any anticipated litigation, we find section 552.103(a) to be inapplicable. The university therefore must release the requested audit reports at this time.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact our office.

Yours very truly,



Loretta R. DeHay
Assistant Attorney General
Open Government Section

LRD/RWP/rho

Ref.: ID# 24157
ID# 24230
ID# 24490

Enclosures: Submitted documents

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